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No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. The Extraordinary Writ Was Improperly Issued.

The Government seeks through a two step process to support the use of mandamus below. First, that the test of *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 26, permitting the use of mandamus to confine the lower court to to the exercise of its lawful jurisdiction has been "aban-

doned" in favor of its use "as a corrective of serious misinterpretations of the Federal Rules in instances where the ordinary remedy of appeal is inadequate" (Br. 22),[1] citing *LaBuy* v. *Howe's Leather Co.*, 352 U.S. 249; or, that the writ may be used as "an appropriate procedure for testing fundamental questions of first impression concerning the interpretation of [the Federal] rules" (Br. 13), relying on *Schlagenhauf* v. *Holder*, 379 U.S. 104. Secondly, that these principles should apply to criminal cases as well as civil (Br. 25).

In each respect these contentions are inapposite. In *LaBuy* v. *Howe's Leather Co.*, 352 U.S. 249, this Court founded the use of the writ on its being "in aid of appellate jurisdiction" as originally asserted in *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21:

> "Since the Court of Appeals could at some stage of the anti-trust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them. Roche, supra (319 U.S. at 25), and cases there cited." (p. 255)

Here, of course, the Court of Appeals had no assurance that at some stage it could entertain an appeal since the case below was a criminal proceeding. But, more importantly, *LaBuy* said no more than that, in a civil case, "a clear abuse of discretion" (p. 257) was that which permitted the use of the writ.

Since the Government's contention is based in essence upon "clear abuse of discretion" in that Judge Will engaged in a "persistent disregard of the requirements of the federal rules" (Br. 13), the touchstone of the Government's argument is falsely founded and does not accurately reflect the status of the record (See pp. 5-10, *infra*).

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[1] Citation is to Brief For the United States.

Certainly, if mandamus is appropriate in a criminal proceeding under those circumstances, it was nevertheless inappropriately applied below.

The Government's *Schlagenhauf* argument for the issuance of the writ is geared to the assertion that Judge Will was lacking in power to order the disputed request and that such order is one of the first impression. *Schlagenhauf* v. *Holder*, 379 U.S. 104. Unlike *Schlagenhauf* where the challenged order was the first of its kind in any reported decision in the Federal courts under Rule 35, the disclosure of the names of potential witnesses by the use of Rule 7(f) is not unique and is widely reported (see cases at pp. 42-43 of Petitioner's Brief). Furthermore, it would appear that furnishing the names of third persons to whom the defendant has made statements material to the proceedings in this Internal Revenue case is less than what appears to be authorized by present Rule 16(a)(1) of the Federal Rules of Criminal Procedure.[2] In addition, it cannot effectively be contended that petitioner lacked the power, within the meaning of *Schlagenhauf*, to furnish this kind of information when this court has specifically indicated that Rule 7(f) is appropriate to disclose names of

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[2] It is apparent that what was ordered furnished may now be obtained under Rule 16(a)(1) since the government has in this case, as in most Internal Revenue cases, "statements signed by every witness who will testify for the government" (R. 87):

> "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevent (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, coustody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. . . ."

potential witnesses. *Roviaro* v. *United States*, 353 U.S. 53; *Kirby* v. *United States*, 174 U.S. 47; *United States* v. *Debrow*, 346 U.S. 374.

Finally, while the Government would agree that mandamus as a tool for governmental review of interlocutory orders in a criminal case should be unavailable if the ruling is "routine" (Br. 14, 26) the precise breadth of that test as urged is never disclosed. While petitioner has urged at length in his Brief (pp. 16-20) that the use of mandamus should be applied differently in criminal cases, the Government would make no distinction except for prohibiting mandamus to "routine rulings". To create the slightest extension of the use of the extraordinary writ to criminal cases other than when the order of the lower court deprives the prosecution of its right to trial permitted by law or to the results of a proper conviction would open the floodgates to piecemeal review and effectively disrupt the speedy and orderly disposition of criminal trials. Disputed evidentiary rulings at trial could lead to applications for mandamus while the trial itself awaited action by "the supervisory authority" of the higher courts; unfavorable pretrial orders might cause repeated recourse to the Court of Appeals ultimately to the great detriment of the defendant.

Simply put, mandamus should not be available to the sovereign for review of an interlocutory order in a criminal case merely because of an alleged abuse of discretion. Mandamus must fail here because the petitioner did not so abuse his discretion. But more importantly, if mandamus is to be permitted at all in such situations, it should be strictly circumscribed not by judicial fiat but by Congressional action. Until such time as Congress acts, the extraordinary writ should be used only to control a pro-

cedural order in a criminal case within the district court's jurisdiction where it deprives the prosecution of its right to trial permitted by law or to the results of a proper conviction.

II. Weighing All Relevant Factors, Judge Will Acted Within His Jurisdiction and Did Not Abuse His Conceded Discretion.

The United States apparently does not dispute the fact that the Courts have often disclosed the names of actual or potential witnesses by a bill of particulars, or have discussed such disclosure with approval (Pet. Br. pp. 42-43).[3] While admitting the district court is vested with broad discretion to grant a bill of particulars, respondent alleges petitioner has adopted a "flat rule" (Br. 12), an "invariable rule" (Br. 19) requiring the Government "to furnish a list of potential witnesses". (Br. 12). This "rule", it is urged, constitutes "discovery" which is impermissible under the Federal Rules of Criminal Procedure, both as presently constituted and as was existent at the date of Judge Will's order, and his broad discretion under Rule 7(f) is therefore circumscribed by the discovery limitation of the Criminal Rules.

The Government claims, in essence, that he ruled as he did not because of relevant considered factors, but because he was following his "flat rule". Necessarily, therefore, it is contended that Judge Will ruled improperly because not enough "considerations traditionally deemed relevant to requests for bills of particulars" (Br. 18) were shown. The Government urges not so much that he *could* not have ordered the information given, but that he *should* not have.

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[3] Citation is to Petitioner's Brief.

This is nothing more than a claim of error in his acceptance of the factors causing him to exercise his discretion as he did. It is merely a request of a higher court to substitute its discretion for that of the district court. (See, Pet. br. pp. 34-36). It is effectively a claim by the government that Judge Will acted because of this "uniform" or "flat" rule, and that the defendant did not show enough "cause" as then required under Rule 7(f), to warrant the grant of the bill of particulars. The measure of what is sufficient "cause" need not be decided here, for it suffices to say, the determination of how much "cause" need be shown is a decision which rests within the sound judicial discretion of the trial judge. See *Wong Tai* v. *United States*, 273 U.S. 77, 82.

The record is devoid of a "flat rule". Judge Will indeed took some pain to place his decision granting the disputed request in the context and nature of the instant case:

> "Each of the questions the government seeks to strike ask for certain relevant names. The two indictments here involved charge that the gross sales amount stated on certain tax returns subscribed by the defendant is incorrect * * *
>
> "* * * The reason for requiring disclosure of their names, however, is not that they will or may be witnesses, but that the defendant requires identification of the times, places and persons present in order to prepare his defense . . ." (R. 58, 59)

See also, R. 74, 97.

Judge Will's position was simply that if these statements were "an essential element of the government's case" (R. 95) then the Government has "the duty to tell the defendant . . . where that conversation took place, what time of day or night and what day of the week and

month it was and who was present, not surveilling, but actually participating in the transaction, who can testify as to . . . what was said by one or another party to the conversation" (R. 95).

Indeed the record does not support the accusation that what was ordered by him to be furnished was pursuant to a "uniform rule in his courtroom" (Br. 11), and was a list of witnesses furnished "routinely", "as a matter of course" (Br. 17). The District Judge stated he was not and never has required the Government to disclose their evidence (R. 70) and, that he was not then requiring a disclosure of a list of witnesses (R. 69, 74, 77, 94, 95, 97) nor had he ever, in a criminal case, proposed the civil rule limiting witnesses to a furnished list (R. 77). Judge Will made it plain that he was exercising his judicial discretion (R. 74) to enable the defendant to prepare his defense (R. 76, 93, 98, 100), not to make the Government disclose its case (R. 71, 75) and to thus fulfill the function of the bill of particulars by preventing surprise at the trial which might necessitate an adjournment while the accused prepared his defense (R. 93, 100).

Though Judge Will perceived the obvious anomaly in permitting discovery through "maximum deposition" (R. 75-76) in civil cases but not in criminal cases, nevertheless to suggest (Br. 7-8, 18-19) that he was proposing the same in the instant case or had previously followed a civil-case, full discovery -deposition rule, is a perversion of the facts (R. 77). While the academic merits of full criminal discovery were exchanged,[4] his position never waivered from

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[4] " . . . if the Government doesn't have a sufficient case so that it will stand the light of day before trial, it ought not bring the case. . . . If it has to get one by because if it were examined carefully and thoroughly it would be disclosed not to have substance, then the case should not be brought." (R. 76)

his conclusion that the information requested was that which was "reasonably require[d] to prepare [the accused's] defense" (R. 76), a judgment surely and unequivocably within his judicial discretion to make under Rule 7(f).

Characteristically, the Government now urges this decision was in error because the "defendant is in a better position than anyone else to know the circumstances of his own admissions or statements on which the Government might be relying." (Br. 18) This argument, which has inherent in it the presumption of the defendant's guilt and knowledge of the facts upon which he is accused, was thought by many to have been laid to rest by Justice Whittaker (while sitting as a District Judge):

> "Nor is it any answer to a motion for a bill of particulars for the government to say: 'The defendant knows what he did, and, therefore, has all the information necessary.' This argument could be valid only if the defendant be *presumed to be guilty.* For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed 'that he is ignorant of the facts on which the pleader founds his charges'. Fontana v. U. S., 8 Cir., 262 F. 283, 286; U. S. v. Allied Chemical & Dye Corp., D.C., 42 F.Supp. 425. This conclusion seems to me to be elementary, fundamental and inescapable." *United States* v. *Smith,* 16 F.R.D. 372, 375 (W.D. Mo. 1954).

Every disclosure of information by the Government beyond that contained in the indictment will constitute some measure of "discovery". Even the names of "in-

formants'"[5] are disclosed when required in the interests of fairness. *Roviaro* v. *United States*, 353 U.S. 53. But, the Government urges that such disclosure is outweighed by "the public interest in shielding informants from pretrial harassment." (Br. 13). The keystone of Judge Will's ruling was that the nature of the case and his determination of defendant's need, in such context, to prepare a defense, satisfied any showing of "cause" then required by the rule. Only if the Government could show need to protect the individuals would the need of the defendant be overshadowed by the privilege (R. 59-60, 75, 76). Nor can it be said that in so weighing the relevant factors to make his decision Judge Will acted beyond the standards for disclosures of "informants" as set down by this Court in *Roviaro* v. *United States*, 353 U.S. 53, 62:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's rights to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration, the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

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[5] Unlike most "informant" cases where it is clear either from a search warrant, or upon a trial of the merits that an "informant" in the classical sense exists, here it is impossible to so determine, other to consider an "informant" as "a non-governmental employee to whom incriminating admissions were made" (R. 102). Any "particularized need" (cf., Br. 21) disclosable after a trial on the merits is incapable of being shown in *these* circumstances. Whether such showing is presently necessary, c.f., *Dennis* v. *United States*, 384 U.S. 855, need not be herein reached.

Petitioner acted within his jurisdiction and properly exercised his authorized judicial discretion in granting the disputed request for particulars.

CONCLUSION

The judgment below should be reversed, with directions to vacate the Order issuing the writ of mandamus against Petitioner.

Respectfully submitted,

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